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CREATIVE LEGAL RESEARCH: RELEVANT USES FOR AN OLD LAW SCHOOL CURRICULUM

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In 1970, the case method of studying law turned 100 years of age. Although the passage of time has prompted increasing reexamination of its value as a teaching device, critical commentary on the subject is nothing new. Dean Langdell's then startling new teaching method at the Harvard Law School has been the subject of criticism from its inception in 1870. In 1872, the Boston University Law School was founded, among other reasons, as a means of protesting the new case method.¹ Jerome Frank's earliest critical writings on the subject appeared in 1933;² his latest, in 1949.³ In 1951, Professor Edwin Patterson offered an incisive appraisal of the case method's advantages and disadvantages.⁴ In 1967, when he could then note that the case method was "almost 100 years old," Dean Erwin Griswold chose the law school case method as his farewell topic on retiring as Dean of the Harvard Law School.⁵ Professor Arthur Kinoy, in a 1969 article, called for a departure from 100 years of tradition and a change to more realistic ways of igniting latent student interests.⁶

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1. HARVARD LAW SCHOOL ASS'N, CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 26 (1918). See Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 295 (1967).

Dean Langdell's case method ultimately prevailed at the Boston University Law School. In 1896, a writer on the school's history said: "The aim of the school is to teach principles rather than mere cases; yet cases are always cited to illustrate the principles and fix them in the memory, while a few of the cases in each branch, which have become landmark cases in the law are especially examined and commented upon." Albers, *The Boston University School of Law*, 1 BOSTON L. SCHOOL MAG. 7 (1896).

2. Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907 (1933); Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A.J. 723 (1933).

3. Frank, *A Plea for Lawyer Schools*, 56 YALE L.J. 303 (1947). Judge Frank's book, *COURTS ON TRIAL*, published in 1949, includes a chapter on legal education which collates many of his earlier articles.

4. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL ED. 1 (1951).

5. Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292 (1967).

6. Kinoy, *The Present Crisis in American Legal Education*, 24 RUTGERS L. REV. 1 (1969).

There has been much interim writing.⁷ By the sixties, some writings on the subject were taking on the hue of nostalgic reflections on how the author's view of some years ago failed to attract attention.⁸ The outpouring goes on unabated and has indeed increased in tempo recently as new concerns, reflected in a new student mood, by a new kind of law student body, begin to change the inner character of law schools and to generate pressures for institutional change. What the editors of a recent casebook had to say about the quantity of writing on *Erie R.R. v. Tompkins* holds true for articles on the case method of teaching law: enough has been written on the subject "to sink it without a trace."⁹

The quantitative measure of these writings illustrates the law school case method's outstanding quality of durability. Pilloried for a century, it stands virtually unchanged from the seminal form it was given by Dean Langdell 100 years ago. Pleas for reform, distinguished not only by their numbers but by the reformers' eminence as well, have not made their mark. The case-

7. See, e.g., Robertson, *Some Suggestions on Student Boredom in English and American Law Schools*, 20 J. LEGAL ED. 278 (1968); Friendly, *The Idea of a Metropolitan Law School*, 19 CASE W. RES. L. REV. 7 (1967); McClain, *Legal Education: Extent to Which "Know-How" in Practice Should be Taught in the Law Schools*, 6 J. LEGAL ED. 302 (1954); Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935). This is but a miniscule sample of writings on the subject.

8. In 1943, Professors Myres McDougal and Harold Lasswell of the Yale Law School wrote:

We submit this basic proposition: If legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient and systematic *training for policy-making*. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the evermore complete achievement of the democratic values that constitute the professed ends of American polity.

Lasswell & McDougal, *Legal Education and Public Policy: Professional Teaching in the Public Interest*, 52 YALE L.J. 203, 206 (1943). Of this, Professor Richard E. Speidel, twenty-five years later, was able to say:

Of the countless words written about legal education, these are among the boldest and most widely discussed. No single proposal for reform discards so much of the traditional or places greater demands upon the student, the teacher, and the educational institution. . . . Yet time has passed without action, and the law school curriculum looks about the same.

Speidel, *A Matter of Mission*, 54 VA. L. REV. 606 (1968).

The Speidel article is one of several in a legal education symposium in honor of Dean Hardy C. Dillard. All contributors were asked to focus on the famous McDougal-Lasswell article of 1943. A common theme runs through the symposium articles: most proposals for change in the law school curriculum, like the McDougal-Lasswell proposals, have not been adopted. See *A Symposium in Honor of Hardy C. Dillard: Legal Education*, 54 VA. L. REV. 583 (1968).

9. M. ROSENBERG, J. WEINSTEIN, & H. SMIT, *ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS* 35 (2d ed. 1970).

book's staple is still the appellate case. We find more extracts from law review articles today, more extensive editing of cases, more use of summary notes, even an occasional comic strip,¹⁰ but these all remain somewhat ancillary to the undergirding force of *A v. B*, as decided by the highest court of State X. With one possible exception, a compilation of cases "based on office records" and designed to teach students "what actually goes on in a law office," has not yet been produced.¹¹ Nor has any law school shifted to the type of curriculum proposed by Jerome Frank in his writings on the desirability of clinical law schools.¹²

Despite all that has been said in the past, the law school curriculum remains a vital topic of discussion, and a very legitimate source of inquiry and debate by legal educators; for those now seeking change have an important and catalytic ally in the student body. Largely as a result of student pressures, law schools are beginning to experiment with the curriculum. Most offer at least one clinical course,¹³ and the move by some states to permit law students to make court appearances under appropriate supervision offers possibilities beyond those envisioned by the most passionate clinicians.¹⁴

To cite any one reason as the principal cause of student dissatisfaction at a time when the entire university system is experiencing a complex series of external and internal crises, would be sim-

10. E. THODE, L. LEBOWITZ & L. MAZOR, INTRODUCTION TO THE STUDY OF LAW: CASES AND MATERIALS 71 (1970).

11. The suggestion that edited law office papers be used as a source of casebook material was made by Dean Edwin Griswold, *supra* note 1, at 303.

The one published casebook coming close to this approach is Professor Harrop Freeman's casebook, LEGAL INTERVIEWING AND COUNSELING (1964). See Weihofen, Book Review, 50 CORNELL L.Q. 709 (1965); Malone, Book Review, 18 J. LEGAL ED. 111 (1965); Book Note, 18 VAND. L. REV. 870 (1965).

12. See materials cited notes 2 and 3 *supra*.

13. See Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL ED. 535 (1951). Some of the more novel clinical courses are those which attempt to impart skills in counseling and interviewing. See Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. LEGAL ED. 316 (1959); Katz, *The Law And Behavioral Science Program At Yale: A Psychiatrist's First Impressions*, 12 J. LEGAL ED. 99 (1959); Schwartz, *The Law And Behavioral Science Program at Yale: A Sociologist's Account of Some Experiences*, 12 J. LEGAL ED. 91 (1959).

14. E.g., Rules for Practical Training of Law Students, adopted by the California State Bar Board of Governors, authorizes attorney-supervised law students to counsel clients and make appearances before courts, referees, commissioners, hearing officers and public agencies. The rules require the presence of the supervising attorney in trials before the superior or appellate courts of California and in all criminal matters. STATE BAR OF CALIFORNIA REPORTS, Feb., 1970.

plistic and inaccurate. To single out student dissatisfaction with law school at a time when there is campus-wide unrest might appear parochial. But law schools occupy a rather unique role on campus. In times of extraordinary campus crisis, they are looked to for roles of leadership. Further, a vast majority of future members of Congress, the Senate and state legislatures are now, have been or will be law students, and nearly 100% of both the state and federal judiciary of the future now attend, have attended or will attend law schools in the United States. Whatever the cause of campus-wide student discontent, the student mood in schools of law is particularly worthy of an attempt at analysis, notwithstanding all that has been said, to little or no avail, in the past.

On the subject of curricular reform, dialogue between law school faculties and student bodies sometimes proves difficult because of a fundamental failure of student and faculty minds to meet. Educators' discourse on the nature of the law school curriculum goes to its form, to a method of teaching. They ask, for example, whether the law schools should approach schools of medicine in the degree to which what is taught has a bearing on what is practiced in the profession.¹⁵ Hardly any legal educators suggest that property and torts be dropped from the curriculum; it is the manner in which they and other subjects are taught which stirs debate in the law journals. Mutterings along similar lines echo in law school student lounges—familiar complaints of not knowing where the courthouse is, of not knowing how to draft a lease or how to present evidence at trial. But the underlying reasons for the new law student mood run much deeper in the student psyche. More so perhaps than other students in the university community, law students question the ability of the legal system to respond to legitimate societal grievances.

As a response to law student dissatisfaction with law school studies, it might be tempting to argue for an increase in the now experimental clinical offerings; to substitute a revolutionary change in the curriculum for change by the slower process of evolution; to go all the way with Jerome Frank's scathing denunciation of the

15. On this topic, Jerome Frank was characteristically adamant: "A medical school dominated by teachers who had seldom seen a patient, or diagnosed the ailments of flesh-and-blood human beings, or actually performed surgical operations, would not be likely to turn out doctors equipped with a fourth part of what doctors ought to know. But our law schools are not doing for their students even the equivalent of that shoddy job." J. FRANK, *COURTS ON TRIAL* 232 (1949).

Langdell case method. I think this would be far wide of the mark and not at all responsive to legitimate student discontent, particularly that which afflicts students in the second and third years of law school when the flush of the first year's excitement has passed and unmitigated boredom sets in, pervasively and intractably.¹⁶

In his article, *The Present Crisis in American Legal Education*,¹⁷ Professor Arthur Kinoy links the new law student mood with an underlying crisis in the legal profession:

How can law and a profession whose life is based upon law's existence, remain relevant to the pressing and fundamental problems of contemporary American society; for example, the seemingly unending misery of a colonial war which has warped and distorted the very moral fabric of the nation; the urban crisis and the exploding upheavals of our black citizens demanding fulfillment of rights 300 years overdue, or the increasing threats to the existence of the most elementary democratic liberties of the American people?¹⁸

The new catchword, almost reduced now to a cliché, is relevancy. In the current student lexicon, what part of the law school curriculum is relevant to the needs of any but corporate and other institutional interests?

Professor Kinoy correctly rejects any notion that mere mechanical changes in curricular form might be a panacea for these student concerns. His response is to involve law students in "creative" lawsuits; to use law schools as clinical centers for this involvement, as he did in his and Professor Herbert O. Reid's eminently successful brief for Congressman Powell in *Powell v. McCormack*.¹⁹ He advocates that law schools use such cases as a medical student uses a laboratory or clinic.

Professor Kinoy would add to Judge Frank's arguments for structural changes in the method of teaching an effort to seek out and teach from those cases which stimulate and excite. Although he quotes liberally from Judge Frank's writings, I think Judge Frank's concerns were quite different from those of Professor Kinoy. Judge Frank was concerned not so much with the sub-

16. See Robertson, *Some Suggestions on Student Boredom in English and American Law Schools*, 20 J. LEGAL ED. 278 (1968); Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL ED. 1 (1964).

17. 24 RUTGERS L. REV. 1 (1969).

18. *Id.* at 2, 3.

19. 395 U.S. 486 (1969).

stantive content of the law school curriculum as he was with the form of law school instruction. He believed in a clinically structured law school as a means of bridging a gap between theory and practice—the dull practice, I suspect, as well as the exciting practice.²⁰ Certainly in the thirties and forties, when Jerome Frank did most of his writing, American courts were not handing down with anything like regularity, decisions like *Baker v. Carr*,²¹ *Dombrowski v. Pfister*²² and *Reitman v. Mulkey*.²³ During that time, a writer could not seriously advocate linking law school clinics with the kinds of cases now characterized as exciting and creative, and to which law schools might attach themselves through the conduit of a law school clinic.

The Kinoy article has refreshing insight in calling for a new emphasis in subject matter as well as a new approach in presenting it. But I have some difficulties with an emphasis on live case material which has an inherent capacity to excite. Obviously, a law teacher—indeed, any teacher—would be seriously remiss in his or her duties in failing to grasp every opportunity to stimulate students. One difficulty, though, with satisfying student craving for “relevancy” is that relevancy in the student context is too often equated with inherently exciting subject matter. It might well be that all “relevant” cases are exciting; but surely, not all unexciting cases are irrelevant. How many cases of cardinal importance to alienated Americans fail to attract the public spirited legal craftsman because they lack that quick capacity to trigger the intellect and fire the imagination? In the law schools, how much of what is offered merely gives an appearance of irrelevancy? And how much of that still appears irrelevant after it is taught?

More and more one hears from young lawyers connected with poverty law agencies such remarks as, “I have a welfare case, but it boils down to a trust problem; and I wish I knew more about trusts.”²⁴ Examples of “relevant” uses for “irrelevant” law school courses abound.

20. See material cited notes 2 and 3 *supra*.

21. 369 U.S. 186 (1962).

22. 380 U.S. 479 (1965).

23. 387 U.S. 369 (1967).

24. The case is *Oudin v. California*, No. 964306 (Los Angeles Super. Ct., filed Oct. 31, 1969), a suit by a legal services agency, The Western Center on Law and Poverty, to restrain enforcement of revised state welfare regulations which required invasion of educational trust funds. A temporary restraining order has been issued. No. 964306 (Los Angeles, Super. Ct., granted Oct. 31, 1969).

MINORITY STUDENTS IN LAW SCHOOL

Last summer a group of young law students obtained proxy votes enabling them to appear at a General Motors shareholders' meeting to question GM's management policies as they affect the poor, including the question of black representation on General Motors' Board of Directors.²⁵ In 1968, a black clergyman in Philadelphia set up a community development corporation, which multiplied \$250,000 of its own equity into a four million dollar investment in the black community and ultimately created a federally-financed, low-income housing project, a shopping center, an aerospace components company, and a garment manufacturing company.²⁶ In 1966, a court of appeals decided that cleaning women in a leased portion of a bank-owned building in Savannah, Georgia were covered by the Fair Labor Standards Act and entitled to receive the minimum wage and overtime pay required by that Act.²⁷ In 1969, the Department of Labor recovered from a Mississippi farmer \$50,000 in back wages due 200 laborers whom the farmer had charged \$70.00 per month rent for wooden shacks found to have a true rental value of \$5.00 per month.²⁸

All of these cases have a common thread: they involve a poor person, a black person, or both, either as a party to the immediate action or as an eventual beneficiary of the action taken. At the same time, the result in each case hinges on the resolution of issues arising in areas of the law which would not pass muster today as relevant or exciting.

Today, a corps of young legal services lawyers does not realize until after leaving law school that the basic staple of the law school curriculum must often be heavily relied upon in poverty and civil rights cases. Law schools would be more exciting and useful places if this could be driven home throughout law school. But apart from the obviously "relevant" law school courses, few are taught with an emphasis on their potential for use in poverty or civil rights litigation.

25. See Maeroff, *Stinging the Corporations*, NATION, June 22, 1970, at 17; THE NEW YORKER, June 20, 1970, at 40-51.

26. Note, *Community Development Corporations: Operations and Financing*, 83 HARV. L. REV. 1558, 1562-67 (1970). The operations and financing of three other community development corporations are described in the article.

27. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857 (5th Cir. 1966); see *Maryland v. Wirtz*, 392 U.S. 183 (1968).

28. 2 CCH LAB. L. REP. (Wages-Hours) ¶ 3004 (1969).

It is not entirely the fault of law teachers that the relevancy of some subjects, or aspects of some subjects, does not become apparent until a young civil rights, poverty, or other public service lawyer encounters a live case in which he is compelled to conjure up from the farthest recesses of his mind a vital portion of a course once looked upon as deeply esoteric. Only during the last five years have funded law agencies provided a firm corps of lawyers to handle on a sustained basis the types of cases which do not generate the fees required to maintain a law office.²⁹ These cases have produced a body of law sometimes loosely referred to as "poverty law," as though a new body of substantive law has evolved, when in fact the few casebooks on the subject merely bring together those legal disciplines which have long had an identifiable effect on the poor: constitutional law, employment discrimination law, housing discrimination law, family law, and consumer credit law.³⁰ Without providing much that is substantively new, these publications merely collate subject matter which has escaped the "irrelevant" label. But there is room for much more. In addition to collating decisions now affecting the poor, law teachers and students might undertake a far more creative role.

Many of the landmark cases like *Sniadach v. Family Finance Corporation of Bay View*,³¹ are those in which the aggrieved individual was a defendant; someone wanted something which defendant did not want to give up, like the garnished wages in *Sniadach*, the new automobile or the furniture in a typical repossession case, life and liberty in a criminal case, the right to shelter in a landlord-tenant case. Certainly the efforts of lawyers in these cases should continue. But the nation's number one domestic problem, the growing black-white schism, needs more than a legal rearguard defensive action; it requires the channeling of more academic legal talent to affirmative types of lawsuits aimed at the root causes rather than the symptoms of the awful plight of the nation's two largest minority groups—blacks and Mexican-Americans.

Courses which are relevant and not exciting by student standards should be taught with an emphasis on their potential for rele-

29. Most legal services agencies are precluded from accepting "fee-generating" cases.

30. E.g., P. DODYK, *LAW AND POVERTY: CASES AND MATERIALS* (1969). A new "Social Justice Through Law" series collates cases of social significance in the areas of civil procedure, contracts and property. E.g., H. SEMMEL, *SOCIAL JUSTICE THROUGH LAW: NEW APPROACHES IN THE LAW OF CIVIL PROCEDURE* (1970).

31. 395 U.S. 337 (1969).

vancy, not only with respect to the nation's priority race problem, but the secondary problems of the quality of life in America, the environment, and urban decay, as well. It seems hardly necessary to wait for a case to walk into a law office and become, by happenstance, a novel and creative case. The ideas for such actions can be generated in an atmosphere of intellectual excitement in the law schools today. Potential poverty and civil rights uses for antitrust laws, the securities laws, the tax laws, the communications laws, and many other previously untapped sources can be exploited by scholars and students. All that awaits is for existing energies, concerns and will, to be combined with expertise and sublimated to a new path.

In what ways, for example, might the antitrust statutes be used to effectively eliminate conspiracies by powerful real estate broker groups to keep white neighborhoods white? Those who are not antitrust lawyers may have no answer; and antitrust lawyers may have no answer on the tips of their tongues because they have not turned their thoughts from the traditional topics with which antitrust lawyers are ordinarily concerned. Scholars in the field might research this question and make the results known to legal services attorneys and other public interest attorneys in a position to file the necessary suits.

What, if any, legal remedies might exist for blacks victimized by a governmental anti-inflation policy which, through various forms of executive and administrative action, accepts high unemployment rates as a price for a reduction in inflationary trends at a time when the rate of black unemployment in the United States is invariably twice the rate of white unemployment? Obvious problems of justiciability, executive discretion, the identification of a class of injured parties, and the appropriate parties to join as defendants, might appear at first blush—and indeed might well be—insurmountable. But these are fluid concepts, and it would be intriguing to see the strongest possible arguments on both sides of the question, in the form of a draft complaint, an answer, motions for summary judgment and supporting briefs, all prepared by students and faculty members in a joint venture of creative research cutting across the legal disciplines of administrative law, constitutional law, civil procedure and federal jurisdiction. It would be intriguing to see how the growing vanguard of legal services and

other public spirited lawyers might use the product of that effort. If the courts are not ready to entertain an action like this today, what of tomorrow?

For the moment, the merits of these two problems can be put aside. They are offered as examples of the kinds of new uses to which old subjects might be put, as examples of a different kind of research for new and important reasons. The difference between this research activity and traditional legal research is the new emphasis on issues not within the context of a real case, but well within the context of a potential case; a new emphasis on novel issues which might remain unnoticed and unthought of but for the work of concerned law teachers and students using each other as participating researchers or as product critics.

The machinery for this activity exists within the law schools. Law teachers produce hypothetical cases for examinations; teachers and students produce hypothetical cases for moot court arguments. Every teacher of law has witnessed student enthusiasm for a moot court brief-writing effort—a product of a deeply ingrained student desire to be creative. Creative research might go further in exploiting that desire, for it would combine satisfaction of the creative instinct with the admirable, but unsatisfied student desire to make an effective contribution to the alleviation of America's social ills.

To accomplish this, a large faculty effort would be required, particularly in those legal disciplines not ordinarily associated with social causes. Research in the traditional way of analyzing the implications of the case of *A v. B*, as decided by an appellate court, is now the norm. Turning expertise in communications law, securities law, trade regulation, taxation, and others, from the normal concerns of those areas might prove difficult. While every creative research effort will not ultimately translate to a landmark court decision, carefully drafted problems, raising new issues for new uses, will nearly always enhance the learning process. Problems which are both pedagogically useful and useful to legal services and other public interest attorneys will compound the benefits.

Creative research is worth exploiting, at least experimentally. It would go to substance and not merely to the form of the law school curriculum; it would be more responsive to legitimate student concerns. It would afford law teachers an opportunity to

make more useful and valuable research contributions in areas going to the root causes of racial and economic inequities, and in a manner affording avenues of communication far beyond those now provided by the pages of a law review. If nothing else, this generation of law teachers might succeed in convincing this generation of law students that almost nothing in the law school curriculum is really "irrelevant."

